

REGULATING THE ECONOMIC PIE: KEY TAKEAWAYS FROM THE ACCC'S 2021 ENFORCEMENT PRIORITIES

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By: Ayman Guirguis, Jessica Mandla, Mei Gong

In Brief

Australian Competition and Consumer Commission (ACCC) Chair, Rod Sims, has announced the ACCC's 2021 compliance and enforcement policy and priorities. The focus of the ACCC's 2021 priorities is reflective of its:

- continuation of its unfinished "to do" list in a COVID-19 interrupted 2020
- enduring/ongoing priorities, such as the prosecution of cartel conduct (with two to three prosecutions foreshadowed to commence in 2021)
- pursuit of its recently emerged enforcement focus on digital platforms and strengthening protections for small businesses.

Key updates include:

- continuing to advocate for reforms to address key issues impacting consumers and small businesses:
 - reiterating the need for the prohibition (and penalties) for unfair contract terms and renewing calls for a prohibition against "unfair trading practices"
 - continuing its focus on consumer guarantees issues, particularly for high value goods, including motor vehicles and caravans, together with "hinting" at a future push for the prohibition for non-compliance by suppliers with the consumer guarantees in the Australian Consumer Law
 - ongoing enforcement in the franchise space
- renewed focus on competition and consumer law issues related to COVID-19, including in the aviation, travel and events sectors
- further enforcement actions against digital platforms and in the energy and commercial construction sectors
- proposals to change and rebalance Australia's merger laws.

More Detailed Observations on the ACCC's 2021 Priorities



Industry Focused Priorities

Digital Platforms: The ACCC established a permanent Digital Platforms Branch in 2020 with a specific focus on investigating the practices of the "better known" digital platforms and Ad-Tech/digital advertising.

In 2020, the ACCC launched Court proceedings against a large U.S.-based search engine and Facebook with Mr Sims foreshadowing further cases against digital platforms in 2021.

As part of its ongoing Digital Platform Services Inquiry, the ACCC's next interim report is due to be finalised in March 2021 with a focus on data shared by mobile apps and the role of app marketplaces owned by large digital platforms (such as the Apple app store).

We expect the collection and use of data by digital platforms to be an ongoing focus in investigations and enforcement actions in the digital platforms sector going forward.


Aviation: We expect the ACCC to continue to closely monitor the aviation market, including consumer guarantee issues arising from flight cancellations due to COVID-19 and the state of competition in domestic travel markets, with a particularly focus on plans by Rex Airlines to enter domestic routes.

Energy & Telecommunications:

"Essential services" including energy and telecommunications continue to feature in the ACCC's priorities, with a focus on pricing and selling practices by businesses.

Mr Sims highlighted the importance of new prohibitions to ensure electricity retailers pass on reductions in wholesale electricity costs to consumers and justify certain prices in response to the "enormous" rise in electricity prices in recent years.

Funeral Services: Following longstanding complaints about this sector, the ACCC will focus on market concentration related issues in the funeral services sector, focusing on how funeral businesses may use their significant market power to bundle services, block new entrants to the market, and engage in unconscionable conduct.




Consumer Protection Priorities

Consumer Guarantees: Mr Sims reiterated the ACCC's commitment to resolving consumer complaints about motor vehicles in the context of consumer guarantees.

This year, the ACCC will continue its action against motor vehicle dealers "leveraging" those enforcement powers to achieve "broader industry behaviour change".


The ACCC will also be looking at improving compliance from manufacturers and dealers in the industry, which experienced significant growth during 2020 and accounted for a high volume of complaints to the ACCC.

False or Misleading Advertising: This year, the ACCC has continued its focus on misleading advertising related to COVID-19, including in the event and travel sectors.




Small Business Priorities

Expansion of Unfair Contract Terms: Mr Sims noted that Australia's Unfair Contract Terms (UCT) regime has "important deficiencies". Mr Sims has been vocal on this issue in the past and this latest criticism is a nod towards upcoming reforms to the UCT regime (including the introduction of penalties and the expansion of the definition of "small businesses").



Product Safety Priorities

Quad Bikes: After 23 people died in quad bike accidents in 2020, the ACCC liaised with the Government to implement the first stage of a new mandatory safety standard for quad bikes in October 2020. The ACCC will commence Stage 2 of the standard in October 2021, which will include obligations to improve safe design, such as the installation of operation protection devices.



Enduring Priorities

The ACCC continues to prioritise a number of key areas of enduring focus, including:

- Cartel conduct
- Anti-competitive conduct
- Product safety
- Conduct that impacts vulnerable consumers

Takeaways

The ACCC is seeking to strike a balance between continuing its "unfinished business" in the form of 2020 priorities that were cast aside due to the COVID-19 pandemic, and its new focus areas in 2021.

Mr Sims' reference to continued action on COVID-19 specific issues, in particular the travel industry, indicates that Australia is "not yet out of the woods" and COVID-19 consumer and competition issues (particularly for the aviation industry) will remain firmly in the ACCC's targets.

Another key takeaway from Mr Sims' speech was the overarching themes of law reform and the ACCC's commitment to pursuing enforcement actions in the "public interest". Mr Sims is aggressively advocating for law reform:

- He called for the introduction of an "unfair trading practice" prohibition. This provision would seek to capture conduct that is detrimental to consumers which may fall short of existing unconscionable conduct or UCT laws.
- Mr Sims also announced that the ACCC will be pursuing merger law reform options in 2021 in light of the ACCC's view about Australia's merger control regime being "skewed towards clearance". In particular, the ACCC holds concerns about the difficulties associated with assessing what will happen in the future without the merger (the counterfactual) and insufficient weight being given to the risks to competition (including competition lost, barriers to entry being raised and competitors foreclosed).

With respect to enforcement actions being pursued in the public interest:

- Mr Sims acknowledged the ACCC's recent losses in court against Kimberly-Clark and Jayco Caravans but reaffirmed the ACCC's commitment to taking on cases which it believes are in the public interest. We anticipate that the ACCC will continue to pursue court actions where an area of law may be untested or if a set of facts poses novel questions about the applicability of the law.
- Mr Sims made reference to the ACCC's case against Lorna Jane alleging false or misleading claims with respect to its "Anti-virus Activewear". While it was acknowledged that these issues also sit within the realm of responsibility of the Therapeutic Goods Administration, the ACCC considered there to be a "significant public interest" in this case being pursued under the Australian Consumer Law. In the COVID-19 era and beyond, we would continue to caution businesses against assuming that a regulator other than the ACCC may deal with an issue if the subject matter also falls within the broad scope of competition and consumer laws.

All in all, 2021 is shaping up to be a notable year for the ACCC, small businesses and large companies alike.

KEY CONTACTS



AYMAN GUIRGUIS
PARTNER

SYDNEY
+61.2.9513.2308
AYMAN.GUIRGUIS@KLGATES.COM



JESSICA MANDLA
SENIOR ASSOCIATE

SYDNEY
+61.2.9513.2323
JESSICA.MANDLA@KLGATES.COM

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